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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JON-PIERRE RICKETTS et al., Defendants and Appellants.	E040370 (Super.Ct.No. RIF103852) **ORDER MODIFYING OPINION** [NO CHANGE IN JUDGMENT]

The opinion filed in this matter on December 15, 2008, is modified as follows:

1. On page 38, at the end of the first full paragraph, the following paragraphs shall be added:

In 2004, the Legislature added sections 422.55 and 422.56, which defined various terms concerning hate crimes. (Stats 2004, ch. 700, §§ 5, 6.) "Victim" was defined to include "a community center, educational facility, entity, family, group, individual, office, meeting hall, person, place of worship, private institution, public agency, library, or other victim or *intended victim of the offense*." (§ 422.56, subd. (i), italics added.) The

statute was enacted after the crime and the filing of the charging pleading in this case. In a petition for rehearing, the People rely upon this definition to contend that the reference to the "victim" in the hate crime statute under which the defendants were charged should be construed to include the "intended victim" in this case, Mauricio. We cannot reasonably do so. First, we must presume that, in the absence of an express declaration of retroactivity, a statute has prospective application only. (§ 3; *People v.* Hayes (1989) 49 Cal.3d 1260, 1274.) No such declaration of retroactivity is made here. Second, the same legislative act that added the definition of "victim" also added a definition of another phrase in the hate crime statute—"[i]n whole or in part because of"; as to this phrase, *and only this phrase*, the legislation expressly stated that the new definition did "not constitute a change in, but is declaratory of, existing law . . . ." (§ 422.56, subd. (d).) The failure to include a similar declaration with respect to the new definition of "victim" indicates that the Legislature understood it was making a substantive change to the meaning of the word "victim." The new definition thus expands the scope of the hate crime law to include crimes based upon the defendants' motivation against an "intended victim," as well as crimes based upon the defendants' motivation against the actual victim of the crime.

In addition to violating the statutory presumption against retroactive application of statutes, allowing the sentence enhancement to stand based

upon the new, expansive definition of "victim" would violate the ex post facto clauses of our federal and state Constitutions. (See U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; *People v. Frazer* (1999) 21 Cal.4th 737, 756, quoting *Collins v. Youngblood* (1990) 497 U.S. 37, 43) ["'legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts'"], overruled on another point in *Stogner v. California* (2003) 539 U.S. 607, 610.) By expanding the definition of "victim" in 2004, the legislation effectively increased the punishment for hate crimes that are based upon the defendants' motivation against an intended, but not the actual, victim. Therefore, the new definition of victim cannot support the hate crime finding on count 2.

Except for this modification, the opinion remains unchanged. This modification does not effect a change in the judgment.

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/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Miller
J.